NO. 25226-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DONALD YOUNGBLOOD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER JURISDICTIONS

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to properly instruct the jury on the law of self-defense. CP 60 (Instruction 15), and CP 58 (Instruction 13).[1]

2. Appellant was denied his constitutional right to effective assistance of counsel when trial counsel proposed an erroneous self-defense instruction. CP 60, 73.

3. The trial court erred in giving instruction 13 without the final sentence of WPIC 17.02: "If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty." CP 72.

4. Appellant was denied his constitutional right to effective assistance of counsel when counsel failed to timely move to dismiss Count I of the second-amended information, unnecessarily informed the jury of appellant's prior conviction, and failed to move for a mistrial.

5. The trial court erred in allowing the state to present testimony of the psychiatrist who conducted a competency evaluation where that testimony violated the psychiatrist-patient privilege. 1RP 392.[2]

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[1] Copies of instructions 13 and 15 are attached as appendix A.

[2] This brief refers to the transcripts as follows: 1RP – January 23, 2006 (voir dire), January 24-25, 2006 (trial), March 2, 2006 (post-trial motions),

6. The trial court erred in allowing the state to present testimony of the psychiatrist who conducted a competency evaluation where that testimony violated appellant's Fifth Amendment right against self incrimination. 1RP 392.

7. The trial court erred in allowing the psychiatrist's testimony as part of the State's case-in-chief when the testimony, if admissible at all, could only come in as was offered for purposes of impeachment. 1RP 392.

8. The prosecutor committed misconduct in misstating the law of self-defense. 2RP 167-68, 195.

9. Cumulative error denied appellant his right to a fair trial.

Issues Pertaining to Assignments of Error

1. Did defense counsel provide ineffective assistance when he proposed instruction 15, a self-defense instruction that misstated the law of self-defense and had been disapproved in several published decisions before this trial?

2. Did the trial court err in giving Instruction 13, the standard WPIC 17.02 self-defense instruction, but which omitted the final sentence that told the jury "If you find that the State has not proved the absence of

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May 13, 2006 (sentencing); 2RP – January 26, 2006 (trial, separately paginated).

this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty"? CP 72.

3. Did defense counsel provide ineffective assistance when he failed to timely move to dismiss Count I, and where counsel informed jurors during voir dire that appellant was a convicted felon?

4. Did the trial court err in allowing Dr. William Grant, the psychiatrist who conducted appellant's mental competency evaluation, to testify in the absence of a waiver of the psychiatrist-patient privilege?

5. Did the trial court err in allowing Grant to testify in violation of appellant's Fifth Amendment right against self incrimination as articulated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966)?

6. Did the trial court err in allowing Grant to testify during the State's case-in-chief when the testimony was solely for the purposes of impeachment?

7. Did the prosecutor commit prejudicial misconduct by arguing that appellant could not use force in self-defense because retreating from the situation was an available option?

8. Did these errors, individually or cumulatively, deny appellant his right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On March 8, 2004 the Benton County Prosecutor's Office charged appellant Donald Youngblood with second degree assault stemming from an incident on March 2, 2004. CP 115-16. On May 12, 2004, the trial court ordered Youngblood to be evaluated by a psychologist in order to determine his competency to stand trial. CP 137-39. On October 8, 2004, Dr. William Grant of Eastern State Hospital filed a report, opining Youngblood was competent to stand trial. CP 102-13.

On October 6, 2005 the prosecutor filed an amended information charging Youngblood with second degree assault and first degree unlawful possession of a firearm. CP 89-90. In a second amended information filed January 17, 2006, the prosecutor charged Youngblood with first degree assault, first degree unlawful possession of a firearm, and first degree extortion, all stemming from the same incident. CP 86-87. Prior to trial, the firearm possession charge was dropped. 1RP 135. Following a jury trial on January 24 - 26, 2006, the Honorable Cameron Mitchell presiding, Youngblood was found guilty on the lesser charge of second degree assault and was acquitted of first degree assault and extortion. CP 37-39.

On May 18, 2006, the court ordered Youngblood to serve 9 months, an exceptional sentence below the standard range. CP 104-112. This appeal timely follows. CP 111.

2. Pre-Trial Proceedings

a. Initial Discussion of Certificate of Rehabilitation

Prior to trial and voir dire, defense counsel Kevin Holt informed the court that he possessed a certificate of rehabilitation from 1984 reestablishing Youngblood's right to possess a firearm. 1RP 4. Holt recommended the court "white out" references to Youngblood's prior offense before presenting the charge to the jury. 1RP 4. The prosecutor stipulated to such an action. 1RP 4. Holt also attempted to readdress the certificate of rehabilitation, stating:

> I think the language in [the certificate] is important because the knowledge element of whether or not my client believed he could no longer have a firearm or had been restored the right to have a firearm is necessary and it comes out of that order. So I just simply in that ask that we white out what the crime was and then submit it that way.

1RP 4-5.

The prosecutor responded that he didn't think the certificate would matter. 1RP 6. He added:

> I think what matters, the knowledge element of possession of a firearm is knowing that you have the firearm. I think there are some cases out there saying that it doesn't matter if the person -- the defendant knew that he was not entitled

> to have a firearm … I would like to do a little more research on that. Again, I was just presented this afternoon with a certificate of rehabilitation. And again, I would like to give that to the Court tomorrow morning.

1RP 6.

Holt did not move to dismiss the charge at that time. 1RP 7. No further mention was made of the certificate that day by either party or the court.

b. Voir Dire

The trial judge informed the venire of the charges against Youngblood, including the firearm charge. 1RP 17. During voir dire, Holt spent a substantial amount of time asking the venire if they believed a felon could be rehabilitated and regain his rights to possess a firearm. 1RP 40-41, 56-75. The prosecutor only mentioned the charge once, and did not mention Youngblood's prior conviction. Holt, unfortunately, mentioned it several times. 1RP 56-75. Holt asked a series of questions that could only inform the jurors that Youngblood had a prior conviction:

> Q Is there anybody here who believes that a person should not or does not have a right to carry a firearm? Does anybody here believe that a person does not have a right to carry a firearm? …
> A (Juror No. 2) One if you've been convicted of a felony. You've been convicted of a felony and it's -- call a spade a spade, I don't want having a firearm.
> Q Do you have a problem with somebody who has been rehabilitated having a firearm?
> A Yes.

Q So if a person who has been rehabilitated after a felony, you don't believe they should ever have the right to own a firearm again?
A Nope. Shame on you once. Don't give them a second chance.

1RP 57.

Q You lose your rights whether to have a gun whether it's involved or not. If you are charged with a felony, or any crime of assault, domestic violence, you lose your right to own or possess a firearm. And if you're ever in possession of a firearm again without having it restored by a court of law, you're guilty of a felony, okay? Doesn't require to be armed with the felony -- doesn't require the gun to be involved, ever. You're just saying that people who have had a felony can never own a gun. That's what the State has done. And you're saying that there is no way they could ever have that right restored that you'd look at?

1RP 67.

Q … [W]e have to ask … do you believe that a person who has once lost their right to own a firearm can ever have the right to own a firearm again…
A (Juror No. 8) If you've got a felony for using a gun in an armed robbery, or whatever it would be, then if it's -- the guy's convicted, I figure he should lose that right forever.
Q But if the law tells us, and we're not going to know why a person loses their firearm rights because it just simply says you've got a felony, okay? That's taking $250 from the Bon Marche. You lose your right to own or possess a firearm. The question is: Can a person who has lost his right to own a firearm, in your opinion, ever legally own a firearm again; or are you just going to say --
A If he was using that gun in a robbery, point it at somebody. I mean, the gun was actually used as an armed -- as a weapon, then I figure he should never

have a gun again. Because he's took somebody of his life, you know.

Q The question is going to be, though -- man, I've opened up a can of worms today.

A Yeah, you did.

1RP 69-70.

Two jurors felt that a felon could never be rehabilitated and were dismissed from the venire. 1RP 57, 73. The remaining jurors nonetheless heard the questions asked of other venire members. 1RP 56-75.

c. Motion to Dismiss the Firearm Charge

The day after voir dire, Holt finally moved to dismiss the firearm charge. CP 81-82; 1RP 135-38.[3] Two days before trial he realized his file contained proof that Youngblood received a certificate of rehabilitation allowing him to possess a firearm. CP 83-85; 1RP 4, 140-41. Holt admitted the certificate had been misplaced in the file. 1RP 140. Youngblood reminded him of it two days before trial. 1RP 140. When asked by the court how long he had known of the certificate of rehabilitation, Holt admitted:

> Well, Your Honor, Mr. Youngblood went through his file with me and he had provided this to me, but it had gotten mixed with a bunch of other stuff. [T]his is a relatively old file, it has kind of fallen into a section where it hasn't been as actively worked as it should have been.

[3] The motion was filed January 24, 2006. The typed signature line indicated it was signed October 21, 2005. CP 81-82. This discrepancy was not explained.

1RP 140. After the prosecutor said he would not have pursued the charge had he known of the certificate, 1RP 139, the court granted the motion and dismissed the charge. 1RP 141.

3. Trial Testimony

The events that led to the alleged assaultive act on March 2, 2004 are not disputed. Prior to March 2, Anthony Gillen, a former friend of Youngblood's whom Youngblood sponsored in Alcoholics Anonymous (AA), hired two female strippers and made a pornographic videotape. 1RP 172, 178. Although Gillen testified he was "not really proud to admit" he made the tape, he had refused to give the tape to the dancers when they asked for it. 1RP 172.

The dancers asked Scott Bybee, another friend of Gillen and Youngblood's, to intercede with Gillen on their behalf. 1RP 172. Youngblood and Bybee had been talking with Gillen about relinquishing the tape because the dancers sought the tape's destruction. 2RP 97, 101. While Gillen testified he had destroyed the tape, Youngblood and Bybee testified that Gillen told them he still had it. 1RP 173; 2RP 35. After repeated attempts to persuade Gillen to destroy or relinquish the tape, and after watching Gillen become angry, Youngblood sought to talk with Gillen – both about the tape, and about Gillen's drinking. 2RP 105-06.

Gillen testified there had been no conflict between he and Youngblood up to that point, and that Youngblood was a friendly person. 1RP 169, 174.

On March 2, 2004, Youngblood went to Gillen's house to talk about Gillen's recent behavior and his decision to retain the video. 2RP 106. At this point, Gillen and Youngblood's testimony diverge.

Gillen said he noticed Youngblood sitting in a car when he returned to his house in the evening of March 2. 1RP 167. Gillen said he went inside, put down his books, then he saw the door fly open and Youngblood enter. 1RP 168. Gillen asked him "what the hell was the matter." 1RP 168. Gillen said Youngblood immediately pulled out a gun and pointed it at him. 1RP 169. Gillen said Youngblood spent the 45 minutes of their encounter repeatedly ordering him to "shut up" and threatening to shoot him if he did not remain silent. 1RP 170. Gillen said Youngblood eventually asked Gillen for the tape and for $20 that Gillen owed to Bybee. 1RP 173. Gillen admitted he tried to get back to his bedroom where he had a pellet gun, but Youngblood would now allow it. 1RP 174, 179. On direct examination, Gillen denied ever pulling out a golf club and threatening Youngblood. 1RP 179. Gillen said Youngblood later warned him that he would hear some loud noises and then Youngblood shot two rounds into the floor. 1RP 174. At that point, according to Gillen, Youngblood left. 1RP 175.

Youngblood's testimony differed substantially. His testimony also was corroborated in large part by a tape recording of a phone call Youngblood made from jail describing the incident. 1RP 346-366.

Youngblood testified he had known Gillen for 20 years. 2RP 94. Gillen told Youngblood of at least two instances where Gillen had beaten another person. 2RP 94-96. During at least one of the incidents, Gillen had assaulted a police officer. Gillen made the impression he had no problem taking care of law enforcement officers in a physical altercation. 2RP 95-96.

Youngblood testified to the events of March 2. As he approached the house, he met Gillen on the porch, where they exchanged pleasantries before entering. 2RP 107. As soon as Youngblood entered, Gillen became angry. 2RP 108. Youngblood tried to reason with Gillen and tell him that the situation with the video was "getting out of hand." 2RP 109. After arguing with Gillen about his behavior and the video, Gillen admitted to possessing the video and went to his bedroom to retrieve it. 2RP 109-13. When Gillen came back he moved quickly toward Youngblood, yelling and carrying a golf club. Youngblood was nervous and instinctively tackled Gillen to the floor. 2RP 115-116. After Youngblood stood up, he saw Gillen quickly getting up and coming towards him again. 2RP 116. Youngblood feared for his safety and yelled

at Gillen to stop and then pulled out his gun and fired two rounds into the floor. 2RP 116. After the shots were fired, Youngblood and Gillen spoke for a while, then Youngblood left. 2RP 118.

During trial, the State played an audio recording of a phone call Youngblood had made from jail after his arrest. While in jail, Youngblood spoke with his friend Marty. 1RP 346. The conversation is consistent with Youngblood's personal testimony. He said Gillen "came at him" with a golf club and he used the gun in self-defense. 1RP 356, 359. He confirmed he shot at the floor. 1RP 355.

Youngblood's testimony was further corroborated by Scott Bybee. During the confrontation with Gillen, Youngblood was on the phone with Bybee through the use of an ear piece attached to his cell phone. 2RP 41, 106. Bybee confirmed that during the early part of Youngblood's visit, Youngblood was "pretty calm" and Gillen seemed "extremely agitated." 2RP 43. Near the end, as the conversation was getting heated, Bybee heard Youngblood take in a deep breath, heard Youngblood yell "No, stop" and then heard the bang of a gun. 2RP 46. Bybee testified that as Youngblood was leaving Youngblood said he had pulled his gun when Gillen came after him with a golf club. 2RP 63.

The State impeached Bybee with Bybee's initial statement to police. When the police contacted Bybee on March 5, 2004, Bybee said

he had no information about what happened on March 2. 2RP 50-51. He said he did not know if Youngblood was at Gillen's on the night of March 2. Bybee explained his statement by saying that both he and Youngblood had retained legal counsel who advised him not to talk to the police. 2RP 52, 74. Bybee said he "could not talk about [Youngblood]. 'If you want to talk about me we can talk about me.'" 2RP 54. Additionally, Bybee said he was uncomfortable during the police interrogation because the officers pointed guns at him, jumped on his head, cuffed him, and placed him in a chair. 2RP 72-73.

On the second day of trial, the State offered Dr. William Grant, a forensic psychiatrist at Eastern State Hospital. 1RP 401. Prior to trial, the court ordered Youngblood to undertake a mental evaluation to determine his mental competency to stand trial. CP 137-39. Grant completed the evaluation. CP 103-113.

Defense counsel objected to Grant's testimony based on the psychiatrist-patient privilege, which Youngblood had not waived. 1RP 370-72. The State replied that the privilege did not apply to forensic examinations because they are not for treatment purposes, and that, even if

they were, Grant had informed Youngblood of his Miranda[4] rights during the evaluation. 1RP 373, 377. During direct examination outside the jury's presence, Grant testified he warns patients prior to the evaluation. 1RP 377. Grant said he informed Youngblood of these rights:

> Before beginning this sanity commissioned evaluation interview, the evaluation procedures and the defendant's rights concerning participation were reviewed. He was informed of the limited confidentiality involved in a court ordered evaluation process and that he had the right to request that an attorney be present, the right to consult with an attorney and the right to refuse to answer any questions he did not want to answer. He was informed that anything he said could be shared with the judge, defense attorney, and prosecuting attorney and that upon completion of his evaluation, a report will be prepared and forwarded to the court, the defense attorney, the prosecuting attorney and community mental health. The defendant indicated that he understood the presented information.

1RP 377-78; CP 103.

Grant admitted he did not inform Youngblood of the right to an attorney if Youngblood could not afford one. 1RP 378. Grant did not inform Youngblood that his statements could be used in a legal proceeding against him. 1RP 378. Grant could not guarantee he gave notice that Youngblood could terminate the interview at any time. 1RP 380. Nor could Grant guarantee he reinformed Youngblood of these rights on the

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

second day of the evaluation. 1RP 383. He admitted it was unlikely he read the same statement on the second day of the evaluation, but rather told Youngblood that "the same rules apply." 1RP 384.

After hearing argument and listening to Grant's testimony, the Court overruled the defense objection and decided the testimony was admissible. The Court held Youngblood's statements to Grant were not privileged because they were not made in the course of treatment. The Court did not mention the Miranda claim. 1RP 392, 399.

Before Grant testified before the jury, the attorneys discussed the scope of the psychological evidence. The prosecutor said he did not intend to ask Grant about Youngblood's psychological history. 1RP 388. Defense counsel sought assurance from the court that it would be acceptable to ask Grant about Youngblood's diagnosis of Post-Traumatic Stress Disorder (PTSD) without raising the defense of diminished capacity or insanity. 1RP 389. Counsel sought only to provide the jury with information about how PTSD affects a person's perceptions in light of Youngblood's self-defense claim. Counsel asserted he had no intention of addressing any other diagnosis. The court allowed questioning on the PTSD diagnosis. 1RP 389.

During direct examination, Grant said he informed Youngblood of the limited confidentiality of the examination. 1RP 403. Grant testified,

in contradiction to Youngblood's account in the audio recording, that Youngblood said he left his gun in the car during the episode with Gillen. 1RP 406, 408. Grant also confirmed, however, that Youngblood said Gillen came after him with a golf club from the bedroom. 1RP 412.

The prosecutor asked Grant whether Youngblood had been diagnosed with any mental issues. 1RP 415. Grant said Youngblood had been diagnosed by the Veteran's Administration (VA) with PTSD and antisocial personality disorder. 1RP 415. Grant added the VA "thought he had borderline personality features, which is a kind of a wild, uncontrolled sort of personality type, and depression." 1RP 415. Grant testified that antisocial personality disorder is one in which "the guy … doesn't have a conscience." 1RP 418.

The prosecutor also asked whether Youngblood's mental state might have caused the crime to occur. 1RP 414. Holt objected to the prosecutor's questioning of Grant regarding Youngblood's mental state on the grounds that his mental state was not part of his defense. 1RP 415. The prosecutor responded that he knew that Holt intended to ask Grant questions about Youngblood's PTSD diagnosis and wanted to "beat him to the punch." 1RP 416. The court sustained the objection. 1RP 417. Afterwards, the prosecutor continued to address the issue of Youngblood's diagnosis of antisocial personality disorder without objection. 1RP 417.

During cross-examination, Holt tried to take some of the sting out of Grant's testimony about antisocial personality, but Grant would not allow it:

> Q: The antisocial personality disorder, that's a pretty common legal diagnosis, isn't it?
> A: Well, depends on the population. 80 [sic] percent of the people in prison are said to have it.
> Q: Yeah.
> A: It's a lot less common on the street.
> Q: And in the legal system, you know, 80 percent of the guys in prison have it, it's a pretty common legal definition; correct?
> A: Yes.
> Q: Kind of given pretty freely, wouldn't we agree?
> A: Oh, no. There are criteria that have to be met to make the diagnosis.
> Q: You went through his entire medical history and you verified post-traumatic stress disorder.
> A: I accepted it. I didn't, you know, I didn't – I know what went on in his childhood and it seems to me that there is enough of a connection there to validate that diagnosis.
> Q: And did you do any independent evaluation on the antisocial personality disorder?
> A: Well, the anti personality – the antisocial personality disorder would be – you derive that from his criminal history.
> Q: Which is thirty plus years old.
> A: Yes.
> Q: So it doesn't sound like he's very antisocial now.
> A: Well, you never know. You never know. Because you don't know – just you don't know – you don't know what you don't know about –
> Q: Bottom line is is you're accepting something 30 years old and saying, okay –
> A: Well, armed robbery? Come on.

1RP 419-20.

After Grant concluded his testimony, Holt moved for a mistrial on the grounds that the information about Youngblood's prior conviction was prejudicial. 1RP 440. The court denied the motion, noting that Holt elicited the testimony. 1RP 441-42. But Holt had expressly tried to prevent Grant from revealing Youngblood's irrelevant criminal history. 1RP 386.

4. Self-Defense Instructions and Closing Argument

The defense proposed self-defense instructions. CP 71 (WPIC 16.08; No Duty to Retreat); CP 72 (WPIC 17.02 (Lawful Force, Defense of Self and Others); CP 73 (Lawful Force, "Act on Appearances"). The state objected to the self-defense instructions, asserting the evidence did not support them, but the court rejected the state's argument.[5]

As discussed more thoroughly in argument C.3.a, infra, Instruction 13 informed jurors that Youngblood could lawfully use force if he reasonably believed he was "about to be injured" by Gillen. CP 58; 2RP 153-54. However, Instruction 15, as proposed by defense counsel and adopted by the court, informed jurors that Youngblood could act on appearances only if he reasonably believed that he was in danger of "great bodily harm." CP 60, 73; 2RP 154. Instruction 22 provided the definition

[5] The majority of the parties' discussion about the instructions apparently occurred in chambers, not open court. 1RP 445-46; 2RP 142-44.

for “bodily harm” as “physical pain or injury, illness or an impairment of physical condition.” CP 67; 2RP 157. Instruction 16 informed jurors that “[i]t is lawful for a person … to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.” CP 61; 2RP 155. Instruction 13 also unfortunately omitted this standard concluding sentence from WPIC 17.02: "If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty." CP 72.

In closing, defense counsel argued Youngblood acted in self-defense. Youngblood had consistently reported that Gillen had come after him with a golf club – in statements on the jail phone call, in his testimony, and even in the interview with Grant. 2RP 178-79; 1RP 407. Bybee also confirmed this. 2RP 184. Gillen’s version provided more support – even he admitted he had gone to his bedroom to get a weapon. 2RP 180. Gillen had previously bragged to Youngblood about assaulting others, even police. 2RP 185-86. Based on the facts Youngblood knew, his act of shooting into the floor was simply a “display” of threatened force, both reasonable and measured in response to Gillen’s threats and use of force with the golf club. 2RP 182, 188. Defense counsel further emphasized that Youngblood had the right to stand his ground and had no duty to retreat, in contrast to the prosecutor’s claim. 2RP 187.

The prosecutor, on the other hand, pointed out what he called Youngblood's and Bybee's inconsistent statements to the police and to Dr. Grant. 2RP 159-63. The prosecutor referred to Grant's testimony on several occasions in an effort to undermine Youngblood's credibility. 2RP 161, 163. The prosecution also theorized Youngblood was able to control Gillen, as Youngblood had tackled Gillen when Gillen initially came out of the bedroom. 2RP 167, 194-95.

The prosecutor also claimed Youngblood's use of force was not "necessary" because he had reasonably effective alternatives. Despite the "no duty to retreat" instruction, the prosecutor on several occasions asserted Youngblood should have: (1) "gotten out of Gillen's house," 2RP 167; (2) "backed off," 2RP 168; and (3) "walk[ed] out of the house," 2RP 168. The prosecutor returned to this idea in rebuttal, again asserting that Youngblood should have left, as a reasonable alternative to using force. 2RP 195.

5. Motion for New Trial

After the verdict, defense counsel made moved for new trial under CrR 7.5 on three grounds: (1) the court failed to allow evidence of Gillen's bad character, (2) Grant testified to Youngblood's prior criminal conviction in violation of ER 404(b), and (3) the prosecution

misrepresented the law of self-defense to the jury and prejudiced Youngblood. CP 35-36. The court denied the motion. 1RP 455-46.

C. ARGUMENT

1. PROPOSING WPIC 17.04 AFTER IT HAD BEEN CONDEMNED BY SEVERAL COURTS WAS DEFICIENT PERFORMANCE THAT SERIOUSLY PREJUDICED THE DEFENSE.

The state charged Youngblood with first degree assault. The jury was instructed on that offense and on the lesser included offense of second degree assault with a deadly weapon. CP 51-57, 86. The defense presented a consistent and factually supported theory that Youngblood acted in self-defense after Gillen came at him with a golf club. Youngblood did not actually shoot Gillen, he merely fired two warning shots into the floor. A properly instructed jury could have reasonably found Youngblood's restrained use of force, coupled with the implied offer to use more force if Gillen continued, to have been reasonably necessary to repel Gillen's attack. 2RP 178-87; CP 58-61. This defense was prejudicially undermined, however, when defense counsel proposed, and the trial court used, instruction 15 which misstated the standard for self-defense. CP 60, 73. Because counsel's deficient performance prejudiced the defense, Youngblood's conviction should be reversed and the case

remanded for a new trial. State v. Curtis Woods, __ Wn. App. __, __ P.3d __, 2007 WL 1194910 (No. 24910-7-III, April 24, 2007).

The Sixth Amendment guarantees the right to effective assistance of counsel. U.S. Const. amend. 6; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant." State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland). Counsel has a duty to investigate the relevant law and to propose instructions correctly stating the law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, at 690-91. Counsel's proposal of erroneous instructions may prejudice the defense and require reversal. Aho, at 745-46; State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996).

The state and federal due process clauses require the state to prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). Where the defense presents some evidence of self-defense, the state bears the burden to prove the accused's use of force was unlawful. Stated a different way, the state bears the burden to

prove the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984); Woods, 2007 WL 1194910 at *3-4.

This Court recently addressed the interaction of WPIC 17.02 and 17.04 in State v. Woods. The state charged Woods with third degree assault while armed with a deadly weapon, for an injury inflicted on Richard Probert. Woods offered evidence he acted in self-defense when he jabbed a knife into Probert's shoulder after Probert hit him in the hand with a hammer. Woods actually used force and injured Probert; Probert's wound required three stitches. Woods, 2007 WL 1194910 at *1.

The defense submitted a general self-defense instruction allowing a person to act in self-defense if he reasonably believes he is about to be injured. WPIC 17.02 (instruction 12). Counsel also submitted WPIC 17.04, the "act on appearances" instruction. Woods, at *2 (instruction 13).

On appeal, Woods argued counsel was ineffective for submitting WPIC 17.04 and the state argued the error was invited. This Court rejected the state's claim and reversed Woods' conviction.

This Court first recognized the heightened standard of clarity necessary for self-defense instructions. Woods, at *2 (citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). The court next recognized

counsel's duty to investigate the relevant law. Woods, at *3 (citing State v. Jury, 19 Wn. App. at 263; Strickland, 466 U.S. at 690-91). Proposing an erroneous instruction, even if it is a WPIC pattern instruction, may constitute ineffective assistance of counsel. Woods, at *3 (citing State v. Aho, 137 Wn.2d at 745-46).

The court next reviewed the controlling self-defense law. When faced with a subjective, reasonable belief of imminent harm from the alleged victim, a person may lawfully use force in self-defense. Woods, at * 3-4 (citing, inter alia, Walden, 131 Wn.2d at 474; LeFaber, 128 Wn.2d at 899; State v. Janes, 121 Wn.2d 220, 238-39, 850 P.2d 495 (1993)). Although WPIC 17.02 correctly states that standard, WPIC 17.04 improperly reduces the state's burden.

The problem is that WPIC 17.04 only permits a person to "act on appearances in defending himself" if the person in good faith believes "he is in actual danger of great bodily harm." This "is an erroneous statement of the law of self-defense." Woods, at *5 (citing Walden, 131 Wn.2d at 475 n.3); accord State v. L.B., 132 Wn. App. 948, 135 P.3d 508 (2006); State v. Rodriguez, 121 Wn. App. 180, 185-87, 20 P.3d 984 (2004).

The error is reversible even in homicide cases where the defense must show the accused reasonably feared "great personal injury." Woods, at *5 (citing State v. Freeburg, 105 Wn. App. 492, 504, 20 P.3d 984

(2001) and State v. Corn, 95 Wn. App. 41, 975 P.2d 520 (1999)). But the error is even more prejudicial in a non-homicide case like Youngblood's:

> a more significant problem here is that WPIC 17.04 sets out the standard for self-defense – albeit incorrectly – applicable in deadly force cases. As set forth above, in cases not involving death, the use of force is justified if the defendant reasonably believed he was about to be injured. Instruction 13 [WPIC 17.04] wrongly instructed the jury that the type of injury Mr. Woods had to fear in order to defend himself was one involving great bodily harm. If the distinction between great bodily harm and great personal injury is significant, the distinction between great bodily harm and mere injury is even more so.

Woods, at *5 (emphasis added). Division One of this Court reached the same conclusion in L.B.:

> According to the plain language of RCW 9A.16.020(3), a person has a right to use force to defend himself against danger of injury, "in case the force is not more than is necessary." The term "great bodily harm" places too high of a standard for one who tries to defend himself against a danger less than great bodily harm but that still threatens injury. Where the defendant raises a defense of self-defense for use of nondeadly force, WPIC 17.04 is not an accurate statement of the law because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury.

L.B., 132 Wn. App. at 953 (emphasis added).

As shown by Walden, Freeburg, L.B., and again in Woods, WPIC 17.04 is erroneous. The error also prejudiced Youngblood. The instruction prejudicially required the jury to believe Youngblood was in "actual danger of great bodily harm," when the true standard only required

Youngblood to reasonably believe he was "about to be injured." A rational juror could have believed Gillen's attack with a golf club may have threatened injury, but not to the higher level of "great bodily harm." By increasing the burden on the defense, counsel's deficient performance prejudiced Youngblood. Woods, at *6 ("Woods was prejudiced because the jury may have applied the more stringent 'actual danger of bodily harm' language rather than the accurate 'reasonably believes he is about to be injured' language"); accord, L.B., at 953.

In response, the state may claim the error is harmless. But self-defense instructions require the law to be made "manifestly apparent to the average juror." Walden, 131 Wn. App. at 473; LeFaber, 128 Wn.2d at 900. As this Court held most recently in Woods, the error is presumptively prejudicial and the state bears the burden to show it harmless beyond a reasonable doubt, or that the error was "trivial, or formal, or merely academic and in no way affected the final outcome of the case." Woods, at *6 (citing State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980); and quoting Walden, 131 Wn.2d at 478 (internal quotations omitted)). Where the defense presented evidence showing Gillen threatened Youngblood with a golf club, and Gillen did not back off until Youngblood fired the warning shots, a jury could have found

Youngblood reasonably believed Gillen would injure him, even absent a belief of great bodily harm. Woods, at * 6.

Furthermore, the jury was instructed on the definition of "bodily harm" – which means "physical pain or injury, illness or an impairment of physical condition." CP 67 (instruction 22). The jury also was instructed that "great bodily harm" is an element of first degree assault. CP 51-52 (Instructions 6, 7). Jurors would have necessarily deduced, and correctly so, that "great bodily harm" involves an even greater disfigurement or loss than mere "bodily harm." Cf. Rodriguez, 121 Wn. App. at 186 (prejudicial error to instruct with WPIC 17.04's "great bodily harm" language where jurors are aware of the term's greater requirements).

In response, the state may cite State v. Studd and argue there is no deficient performance because counsel merely proposed a pattern WPIC. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (discussing WPIC 16.02 and State v. LeFaber errors). While it is true the Studd court saved the state from a LeFaber error, it was only because LeFaber was decided after the trials in the consolidated Studd cases. Studd, at 551 (counsel could "hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02"). Trial counsel in Studd did not have LeFaber to inform counsel of the error in WPIC 16.02. Studd, at 551.

In Youngblood's case, however, counsel could have had no legitimate reason to propose the erroneous WPIC 17.04 because it had been condemned in several published decisions before this trial: Walden, Freeburg, and Rodriguez. The error is manifest, and even worse in a non-homicide case. Studd cannot save the state here.

Because counsel's performance was deficient and the error was prejudicial, Youngblood's assault conviction should be reversed and the case remanded for a new trial.

2. THE COURT ERRED IN FAILING TO INCLUDE THE LAST SENTENCE OF WPIC 17.02 IN INSTRUCTION 13.

The defense proposed a complete version of WPIC 17.02. CP 72 (attached as appendix B). The court's instruction, however, deleted the last sentence of WPIC 17.02. CP 58 (appendix A). This was prejudicial error.

The instruction is the general definitional instruction explaining to the jury when a person may lawfully use force in self-defense. The last sentence provides: "If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty." CP 72.

No other instruction informed the jury of the state's burden to prove the absence of the defense. No other instruction informed the jury it

must return a verdict of not guilty if it found Youngblood acted in self-defense. This failure was constitutional error, and per se prejudicial. Reversal is required. State v. Acosta, 101 Wn.2d at 619-25 (citing, inter alia, U.S. Const. amend. 14; Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); In re Winship, 397 U.S. 358, supra); State v. Redwine, 72 Wn. App. 625, 630-31, 865 P.2d 552, rev. denied, 124 Wn.2d 1012 (1994).

3. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO TIMELY MOVE TO DISMISS, BY INFORMING THE JURY OF YOUNGBLOOD'S PRIOR CONVICTION, AND BY OPENING THE DOOR TO PRIOR CONVICTION EVIDENCE.

Youngblood's trial counsel, Kevin Holt, provided ineffective assistance by failing to timely move to dismiss the firearm charge, by informing the jury of Youngblood's prior conviction for no legitimate purpose, and by opening the door to Grant's prejudicial testimony about Youngblood's prior conviction. This deficient performance provided the jury with unfairly prejudicial information in a close case where the defense was substantial and the jury rejected much of the state's theory. Because Youngblood was prejudiced by counsel's deficient performance, the verdict should be reversed and the case remanded for a new trial. Youngblood had the right to effective assistance of counsel. U.S. Const. amend. 6; Const., art. 1, § 22. Strickland v. Washington, 466 U.S. at 686.

The purpose of the requirement of effective counsel is to ensure that there has been a fair and impartial trial. State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).

Ineffective assistance of counsel is established when: (1) counsel's performance was deficient and fell below a minimum objective standard of reasonable attorney performance, and (2), counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. 689-90; In re Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Deficient representation occurs when counsel's "performance falls below an objective standard of reasonableness." Brett, 142 Wn.2d at 873. "Prejudice is established when 'there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" Brett, 142 Wn.2d at 873. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694; State v. Carter, 56 Wn. App. 217,218 n.1, 783 P.2d 589 (1989); State v. Thomas, 109 Wn.2d at 226.

a. Holt's Failure to Timely Move to Dismiss the Possession Charge was Deficient Performance.

On October 6, 2005, the state filed an amended information charging count II, alleging Youngblood unlawfully possessed a firearm. CP 89-90. Youngblood then provided his attorney with documentary proof that his right to carry a firearm had been restored in 1985 and 1994.

CP 83-85. The state filed a second amended information on January 17, 2006, this time including the firearm charge as count I. CP 86-87.

Trial began January 23, 2006. Before voir dire, Holt informed the prosecutor and the court that Youngblood had provided him with a certificate from the Board of Prison Terms and Paroles restoring his rights, and a certificate of rehabilitation and order from the trial court specifically restoring his right to possess a firearm. 1RP 5; CP 82-85. The parties discussed the issue and the prosecutor suggested that the parties do some research and determine how the certificate of rehabilitation might impact this charge. Holt did not move to dismiss the charge at that time. 1RP 7.

The parties then began jury selection. During the course of voir dire, Holt spent a substantial amount of time asking the panel's opinions on whether a convicted felon should ever be able to carry a firearm, even if the person had been rehabilitated. In asking these questions, Youngblood's status as a convicted felon became obvious. See section B(2)(b), supra.

The next day, January 24th, Holt finally moved to dismiss the firearm charge. CP 81-82; 1RP 136-38. Holt provided the court with a written motion seeking dismissal that was signed and dated October 21,

2005.[6] CP 82. The prosecutor complained that he could not understand why the rehabilitation documents had not been previously provided. "If I had this, we probably wouldn't have gone forward." 1RP 139. The prosecutor then orally moved to dismiss count 1. 1RP 139.

The court was displeased with the delay, as the court and counsel had wasted a substantial amount of time in voir dire disqualifying jurors. 1RP 140-41. When the court asked Holt how long he had the information, Holt admitted he had the information in his file, but it had "kind of fallen into a section where it hasn't been as actively worked as it should have been." 1RP 140. Youngblood had again provided Holt with the certificate restoring his firearm rights "[a]bout two days ago." 1RP 141.

The court then dismissed the charge. 1RP 141. Holt made no effort to seek a mistrial, however, to remedy the prejudice from the jurors unnecessarily hearing about Youngblood's felony conviction during voir dire. Holt's performance was deficient.

Where the law provides a procedure to dismiss a charge, and where defense counsel fails to do the research necessary to timely utilize that procedure, counsel's performance is deficient. Carter, 56 Wn. App. at

[6] It is unclear why the signature line was dated October 21, but not filed until January 24. The court never questioned it and Holt never sought to explain it. The date on the motion is 15 days after the first amended information of October 5.

218. A defense attorney has an affirmative duty to "avoid unnecessary delay in the disposition of cases." Standard 4-1.3(b) ABA Standards for Criminal Justice (3d ed. 1993). Specifically, other ABA standards, in pertinent part, address defense counsel's duty to make necessary motions:

> The lawyer should consider all procedural steps which in good faith may be taken, including, for example . . . moving for a change of venue or continuances . . . and seeking dismissal of the charges.

Standard 4-3.6

Carter is on point. Carter argued he was deprived of effective assistance of because counsel failed to raise a pretrial mandatory joinder objection under CrR 4.3(c)(3). Carter, 56 Wn. App. at 219. The State conceded the two charges arose from the same conduct, and thus, dismissal was mandated by CrR 4.3(c)(3). Id., at 221. The Court of Appeals determined that defense counsel's performance was deficient because a failure to move to dismiss "cannot be characterized as a tactical decision or one of trial strategy." Id., at 224.

This Court reached the same conclusion in State v. Lopez, 107 Wn. App. 270, 277, 27 P.3d 237 (2001), aff'd, 147 Wn.2d 515 (2002). Lopez argued counsel was ineffective for failing to move for dismissal of an unlawful firearm possession charge after the State had rested. Lopez, 107 Wn. App. 274. The State had failed to produce evidence of a prior

conviction for a serious offense. Id. The sole evidence of a conviction was Lopez's fleeting admission during his direct testimony in the defense phase of the trial. Id. At the close of trial, defense counsel failed to move to dismiss. Id., at 277. This Court held there could be no sound strategic or tactical reason for counsel's failure, especially when the trial court would be required to grant the motion. This Court concluded that counsel's performance was deficient. Id.

When applied here, these cases and guidelines establish Holt's deficient performance. The trial prosecutor admitted the State would not have pursued this charge had Holt revealed the certificate earlier. The court granted dismissal immediately. 1RP 139-41. Further, had Holt done the research, he would have quickly found State v. Leavitt, 107 Wn. App. 361, 368, 27 P.3d 622 (2001), and would have discovered "a denial-of-due-process defense arises where a defendant has reasonably relied upon affirmative assurances that certain conduct is lawful, when those assurances are given by a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue." Leavitt, 107 Wn. App. at 368. The certificate of rehabilitation, signed by a judge, more than satisfied this defense. CP 82-85.

The prosecutor initially appeared to believe Youngblood could not restore the right to possess a firearm. 1RP 7. RCW 9.41.040(1)(a) states:

> A person … is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted in this state or elsewhere of any serious offense as defined in this chapter.

But the legislature has provided exceptions to the above rule when "the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted…" RCW 9.41.040(3).

Here, Youngblood unquestionably provided a certificate of rehabilitation. CP 83-85; 1RP 137. Given that Youngblood could legally posses a firearm, any reasonable defense attorney would have moved to dismiss the firearms charge immediately. While the charge eventually was dismissed, the dismissal came after Holt had already polluted the jury panel with evidence of Youngblood's prior conviction. Holt's failure to timely move for dismissal constitutes deficient performance.

b. Holt's Voir Dire Questions And Failure to Move for Mistrial Constitute Deficient Performance.

Holt's deficient performance continued during voir dire. Under the Sixth and Fourteenth Amendments, a criminal defendant has a right to trial by a jury that is representative of the community. State v. Hilliard, 89 Wn.2d 430, 440, 573 P.2d 22 (1977) (citing Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Smith v. Texas, 311 U.S. 128,

311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940)). Under the criminal rules, "[a] voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable intelligent exercise of peremptory challenges." CrR 6.4(b). Accordingly, an accused's right to examine prospective jurors carefully is enforced to an extent necessary to grant him or her every reasonable protection. State v. Wilson, 16 Wn. App. 348, 355, 555 P.2d 1375 (1976) (citing State v. Hunter, 183 Wn. 143, 48 P.2d 262 (1935)). It is not "a function of the [voir dire] examination … to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." State v. Frederickson, 40 Wn. App. 749, 752, 700 P.2d 369 (1985).

Holt's performance was deficient where he repeatedly and unnecessarily informed the jury that Youngblood had a prior felony conviction. 1RP 56-75. Had Holt timely moved to dismiss the charge, this prejudicial information would never have been before the jury. Because Holt polluted the jury panel by informing them of Youngblood's prior conviction, his performance was deficient.

c. Holt's Deficient Performance Prejudiced Youngblood.

Evidence of Youngblood's conviction prejudiced the jury in the same manner as ER 609 or 404(b) evidence. Such evidence is prejudicial because it allows the jury to find guilt based on a prior bad act. State v. Calegar, 133 Wn.2d 718, 724, 947 P.2d 235 (1997); State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993). The state cannot establish the jury was not influenced by the erroneous admission of Youngblood's prior conviction for armed robbery.

The Supreme Court has recognized the inherent prejudice of prior conviction evidence and that it has a tendency to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. Calegar, 133 Wn.2d at 724; State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984) (overruled in part on other grounds by State v. Ray, 116 Wash.2d 531, 806 P.2d 1220 (1991)). Reference to prior crimes in a criminal trial has extraordinary potential for misleading and confusing a jury into believing it is being told that defendant is a "bad" person and therefore guilty of the crime charged. State v. Newton, 109 Wn.2d 69, 76, 743 P.2d 254 (1987). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. The

prejudice is even greater when the prior conviction is similar to the crime for which the defendant is being tried. Jones, 101 Wn.2d at 120.

In Jones, petitioner Darryl Young was charged with first degree robbery stemming from an incident in which two men stole a safe from a home. Jones, 101 Wn.2d at 116. Prior to trial, Young filed a motion in limine to exclude evidence of his prior convictions. Young had been convicted of forgery and credit card theft. The State was permitted to offer the convictions as impeachment under ER 609(a)(1). Id. At trial, Young presented an alibi defense. On direct examination, he admitted the forgery convictions. On cross-examination, the prosecutor elicited an acknowledgment of the credit card theft convictions. Id. Upon review, the Supreme Court held that the admission of the prior crimes was more prejudicial than probative and that the error was not harmless because:

> The admission of Young's prior convictions may well have colored the jury's consideration of his testimony. Further, the credit card theft conviction bore some similarity to the crime for which Young was being tried, hence the potential for prejudice was increased.

Id., 101 Wn.2d at 126.

The Supreme Court's decision in Jones stands for the proposition that when each side presents a plausible explanation of events and the evidence presented at trial ultimately requires the jury to reach its verdict on the basis of credibility determinations, it will never be harmless error

when prior convictions are improperly admitted. This is because the admission of prior felonies has long been recognized as weighing heavily on credibility and may too readily be the improper basis of a jury's verdict.

Similarly, Division Two has held defense counsel's failure to object to unfairly prejudicial bad acts evidence may amount to ineffective assistance. Dawkins, 71 Wn. App. at 909-10. The state charged Dawkins with two counts of second degree child molestation. Dawkins, 71 Wn. App. at 903. Defense counsel was aware of allegations of prior uncharged incidents of sexual contact between Dawkins and one of the alleged victims, but failed to object to that testimony. Id. Because the question at trial was whether Dawkins was the perpetrator, the trial and appellate court found court found the prejudice Dawkins suffered to his credibility as a result of the testimony "was very great." Id., at 909. The court concluded that the jury could have convicted Dawkins based on the earlier encounters. Dawkins, 71 Wn. App. at 911.

Holt's admission of Youngblood's prior conviction had the same effect as prejudicial evidence in Jones and Dawkins. The jury heard testimony from both sides as to the events that transpired on March 2, 2004. The determination of guilt was based exclusively on the credibility determinations of Gillen and Youngblood, and was even more important

because Youngblood claimed self-defense. Holt's deficient performance created prejudice because it raised questions about Youngblood's veracity in a case where, absent the knowledge of Youngblood's prior conviction, the jury was forced to decide between Youngblood and Gillen's version of the events. It is essential to Youngblood's theory of self-defense that the jury believe him. If the jury suspected that Youngblood was dishonest, mentally incompetent, or a recidivist, the jury may well have given Gillen more credence than he deserved.

The jury's acquittal on the extortion and first degree assault charges suggests serious reservations about the State's case-in-chief. Even with the unfairly prejudicial evidence against Youngblood, the jury found him guilty only of the lesser included second degree assault. Subtracting the statements about Youngblood's robbery conviction renders the State's case substantially weaker.

Because counsel's performance was deficient and prejudice resulted, the assault conviction should be reversed and the case remanded for a new trial.

4. BY ADMITTING GRANT'S TESTIMONY, THE TRIAL COURT VIOLATED THE PSYCHIATRIST-PATIENT PRIVILEGE AND YOUNGBLOOD'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

This argument raises a relatively rare issue: whether a psychiatrist who performs a psychological examination to determine a person's mental competency to stand trial should be prevented from testifying at the criminal proceeding against that person. While numerous cases detail whether a psychiatrist can testify when the defense asserts insanity or diminished capacity, no case law addresses the issue when those defenses are not raised. However, numerous Washington cases, and cases in other jurisdictions, advance the conclusion that a psychiatrist performing a competency evaluation cannot testify under these circumstances. Because the trial court erred in allowing Dr. Grant to testify over the objection of defense counsel, the conviction should be reversed and remanded for a new trial.

On May 12, 2004, the State requested an order directing Youngblood to submit to an evaluation pursuant to RCW 10.77.060 in order to determine his competency to stand trial.[7] CP 137-39. Because

[7] RCW 10.77.060(1)(a) provides, in relevant part:

> Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency,

Youngblood was not raising an insanity or diminished capacity defense, the hearing was exclusively for the purpose of determining his competency.

If an accused pleads not guilty by reason of insanity or raises a diminished capacity defense, he or she waives the right to the psychiatrist-patient privilege. State v. Hutchinson, 135 Wn.2d 863, 873, 959 P.2d 1061 (1998) (Hutchinson III), cert. denied 525 U.S. 1157 (1999) (RCW 10.77, which outlines the procedures to determine if a defendant is incompetent or insane, including the privilege against self-incrimination, does not apply during trial where diminished capacity is raised). Similarly, when an accused pleads not guilty by reason of insanity, and proffers evidence in support of that plea, statements uttered in the context of a psychiatric examination by defense experts are not protected by the Fifth Amendment. State v. Carneh, 153 Wn.2d 274, 282, 103 P.3d 743 (2004) (citing State v. Pawlyk, 115 Wn.2d 457, 465-66, 800 P.2d 338 (1990)); State v. Bonds, 98 Wn.2d 1, 20, 653 P.2d 1024 (1982), cert.

> the court on its own motion or on the motion of any party shall … appoint … at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1).

denied, 464 U.S. 831 (1983)); accord. Hutchinson III, 135 Wn.2d at 876; State v. Jones, 99 Wn.2d 735, 749, 664 P.2d 1216 (1983).

In addition, when insanity is a defense, the court may order a sanity examination by a court-appointed expert without violating the constitutional privilege against self-incrimination. RCW 10.77.060(1)(a); see also Carneh, 153 Wn.2d at 282; Hutchinson III, 135 Wn.2d at 876; Pawlyk, 115 Wn.2d at 466; Bonds, 98 Wn.2d at 20. But the statutory scheme also grants a defendant who is subject to a court ordered sanity evaluation an unqualified right to "refuse to answer any question if [the defendant] believes his or her answers may tend to [be incriminating] or form links leading to evidence of an incriminating nature." RCW 10.77.020(4).

No statutory authority allows admission of incriminating statements recorded by a psychiatrist during a competency evaluation. However, the law in this state and other jurisdictions holds that incriminating statements are not admissible. See, e.g., State v. Cochran, 102 Wn. App. 408, 484, 8 P.3d 313 (2000) (The court is the gatekeeper to prevent admission of incriminating statements that may be gathered during the required evaluation); State v. Brewton, 49 Wn. App. 589, 592, 744 P.2d 1024 (1982) ("Courts have been careful to restrict the use of a defendant's incriminating statements. The trial court can protect the

defendant's Fifth Amendment interests by refusing to permit cross examination on statements that might be considered confessional. This achieves a proper balance between the competing interests of full disclosure while protecting privacy and the right against self-incrimination."). See also, Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (the privilege against self-incrimination applies at penalty phase to statements in court-ordered competency examination); Pens v. Bail, 902 F.2d 1464 (9th Cir. 1989) (quoting Jones v. Cardwell, 686 F.2d 754 (9th Cir.1982) ("where the State's agent seeks from the convicted defendant a confession of additional criminal activity and that confession is used to enhance a defendant's sentence, we think it beyond peradventure that the defendant may properly claim the protection of the privilege against self-incrimination")); United States v. Cohen, 530 F.2d 43, 47-48 (Fifth Cir.1976), cert. denied, 429 U.S. 955, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976) (any statement about the offense itself could be suppressed); United States v. Bohle, 445 F.2d 54, 66-67 (7th Cir. 1971); United States v. Baird, 414 F.2d 700, 710-11 (2d Cir. 1969), cert. denied, 396 U.S. 1005, 90 S.Ct. 559, 24 L.Ed.2d 497 (1970). See also 18 U.S.C. § 4244 (incriminating statements made during examination to determine defendant's competence to stand trial are inadmissible).

Because Grant was allowed to testify over defense objection and in violation of established precedent, the assault conviction should be reversed and the case remanded for a new trial.

a. Youngblood Never Waived the Psychiatrist-Patient Privilege.

The court ordered a competency evaluation consistent with RCW 10.77 and CrR 4.7 based on Youngblood's prior diagnosis of PTSD and antisocial personality disorder. CP 137-39. But because Youngblood never raised insanity or diminished capacity as a defense, he did not waive the psychiatrist-patient privilege. Grant's testimony was inadmissible. State v. Hutchinson, 111 Wn.2d 872, 883, 766 P.2d 447 (1989) (Hutchinson I).

Nor did Youngblood waive the privilege by voluntarily talking with Grant during the competency evaluation as the trial court reasoned. While the trial judge held Youngblood waived the privilege because Grant informed Youngblood anything he said could be given to the court, 1RP 378, the scope of any waiver was narrow. Grant said he informed Youngblood any information gathered during the competency evaluation would be distributed to the court, the prosecutor, and defense counsel. 1RP 377-78. But where the purpose of an evaluation is to determine competency, the privilege should be waived solely to achieve that purpose.

If Youngblood voluntarily waived the privilege, he did so with the expectation that the information would be used to determine competency, and not as an evidence gathering technique for the State. Nothing Youngblood said or did waived the privilege as it relates to an adversarial trial. Grant did not inform Youngblood anything he said could be used against him in a court of law, nor did Youngblood have any reason to suspect it would. Given that Grant did not inform him that his statements could be used against him in a criminal proceeding, Youngblood expected that his statements would be limited to the report to the court.

Because any waiver of the privilege would be limited to the competency evaluation, the proper remedy is to reverse the assault conviction and remand for a new trial with orders to prevent future testimony of Dr. Grant.

b. If Youngblood Did Waive His Rights to the Psychiatrist-Patient Privilege, the Waiver is Limited to Grant's Diagnosis.

Even if Youngblood did waive his right to the privilege, the waiver is limited to Grant's professional impressions of Youngblood's mental state. The waiver of the psychiatrist-patient privilege does not allow an examining psychiatrist to testify to any and all things said during evaluations. Hutchinson I, 111 Wn.2d at 883. The Supreme Court has clearly drawn a distinction between a psychiatrist's testimony that is

observational in nature and testimony that tends to incriminate the defendant. Id., at 883.

> [W]e are persuaded … that a distinction should be drawn between testimony by the expert (a) which on the one hand gives (i) his opinion on sanity or insanity and (ii) his non-incriminatory observations in arriving at his opinion including non-incriminatory statements by the defendant, and (b) which on the other hand gives his incriminatory observations in arriving at his opinion including incriminatory statements by the defendant. Opinions, observations, and statements under branch (a) are admissible, but observations and statements under branch (b) are inadmissible. Under these principles, an observation or statement is not "incriminatory" merely because it tends to show the defendant is sane.

Id., at 883 (quoting State v. Craney, 347 N.W.2d 668, 673 (Iowa), cert. denied, 469 U.S. 884, 105 S.Ct. 255, 83 L.Ed.2d 192 (1984).

The Supreme Court reaffirmed this distinction in Hutchinson III, stating "an expert should not be allowed to testify to a defendant's incriminating statements, e.g., confessions or admissions that he or she committed the crime charged." Hutchinson III, 135 Wn.2d at 878. The trial court violated these rules by permitting Grant to testify about Youngblood's account of the events surrounding the alleged assaultive act. 1RP 406-408. Such statements were not expert opinions of Youngblood's competency. Rather they were incriminating statements harvested from Youngblood during the competency exam. Following the above-stated

principles of Hutchinson I and III, such statements are inadmissible during trial.

c. Youngblood Retained his Fifth Amendment Right Against Self-Incrimination.

Grant's testimony also violated Youngblood's Fifth and Fourteenth Amendment right against self-incrimination. The general rule is that if a person desires not to incriminate himself or herself, he or she must invoke the protection of the Fifth Amendment privilege against self-incrimination rather than answer. Garner v. United States, 424 U.S. 648, 654 n.9, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976); State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172 (1992); State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). The failure to claim the privilege is excused where the defendant is in custodial interrogation by a state agent. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

The Miranda exception applies when the interview or examination is a (1) custodial (2) interrogation (3) by a state agent. Post, 118 Wn.2d at 605-06. In most cases, "custodial" refers to whether the defendant's freedom of movement was restricted at the time of questioning. Id. at 605-06. "Interrogation" occurs when the government agent should have known that his questioning would have provoked an incriminating

response. Id. at 606. "Custody" for *Miranda* purposes requires "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Id. at 606 (quoting Minnesota v. Murphy, 465 U.S. 420, 430, 435-36, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984)).

In the present case, Youngblood was confined to Eastern State Hospital for 15 days for a court-ordered evaluation by a State employee, and thus was under the protections of Miranda. This case is very similar to Estelle v. Smith. In Estelle, Texas charged Smith with murder and sought the death penalty. Smith, 451 U.S. at 456. At an ensuing psychiatric examination, ordered by the trial court to determine Smith's competency to stand trial and conducted in the jail where he was being held, the examining doctor determined Smith was competent. Thereafter, Smith was tried by a jury and convicted. Id., at 457.

A separate sentencing proceeding was then held where the jury was required to resolve three critical issues to determine whether or not the death sentence would be imposed. One of these issues involved Smith's future dangerousness. Over defense objection, the psychiatrist who had conducted the pretrial examination was allowed to testify based on facts learned in the pretrial examination that Smith would be a danger to society. The jury then resolved the issue of future dangerousness, as

well as the other two issues, against Smith, and thus under Texas law the death penalty was mandatory. Id., at 458.

On review, the United States Supreme Court held the admission of the psychiatrist's testimony at the penalty phase violated Smith's Fifth Amendment privilege against compelled self-incrimination, because he was not advised before the pretrial psychiatric examination of the right to remain silent and that any statement he made could be used against him at a capital sentencing proceeding. Id., at 469.

Youngblood's situation mirrors Smith's. He was in custody against his will without the freedom to leave. He was questioned by the psychiatrist and the questions included ones that led to incriminating information. Lastly, there is no question that Grant was a state agent. Thus, a Miranda warning was required.

Because the Fifth Amendment privilege protected by Miranda attaches at a competency evaluation, any testimony given by a doctor about conclusions and information drawn from such an examination does generally violate the privilege against self-incrimination, absent a knowing and intelligent waiver after warnings as required by Miranda. Jones, 99 Wn.2d at 749; State v. Holland, 98 Wn.2d 507, 519, 656 P.2d 1056 (1983); State v. Bonds, 98 Wn.2d at 19-20.

(1) Youngblood was not Given a Complete Miranda Warning by Grant and Thus, Grant's Testimony Must be Suppressed as a Violation of Miranda.

While Grant testified he read Youngblood his rights that were akin to the Miranda warnings, he failed to inform Youngblood of the nature of all of his Fifth Amendment rights. Youngblood was not informed that he could have access to counsel even if he could not afford one. Nor was Youngblood informed that anything he said could be used against him in a court of law for any reason other than a competency evaluation. Additionally, it is unclear whether the warnings were given again on the second day of questioning. 1RP 383.

Because the Miranda warnings were not properly given, Grant's testimony should be suppressed as a violation of Youngblood's right to be free of compelled self-incrimination. Smith, 451 U.S. at 468-69.

(2) Grant's Testimony is Inadmissible as Impeachment.

Even if Grant's recitation of Youngblood's legal rights satisfied Miranda, Grant's testimony is inadmissible for the purposes of impeachment, and reversal and remand is merited. Even in circumstances where the privilege against self-incrimination is not waived, the privilege may not be asserted to prevent the State from using defendant's statements to impeach his credibility after he has taken the stand. State v. Easter, 130

Wn.2d 228, 237, 922 P.2d 1285 (1996) (comment on defendant's post-arrest silence during State's case-in-chief for the purpose of impeachment violates 5th Amendment); Holland, 98 Wn.2d at 519 (citing Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)); State v. Davis, 82 Wn.2d 790, 514 P.2d 149 (1973). The Supreme Court has held that, while a statement obtained from a defendant without advising him of his right to counsel and of his right to remain silent, and warning him that anything which he says may be used against him in a court of law, *cannot be used by the prosecutor to make out his case in chief*, it may be used to impeach the defendant if he takes the stand and makes statements contrary to those previously given, provided that its trustworthiness satisfies legal standards. Holland, 98 Wn.2d at 520 (citing Davis 82 Wn.2d at 793) (emphasis added); Riddell v. Rhay, 79 Wn.2d 248, 252-53, 484 P.2d 907, cert. denied, 404 U.S. 974 (1971); State v. Brown, 113 Wn.2d 520, 556, 782 P.2d 1013, 80 A.L.R.4th 989 (1989), 787 P.2d 906 (1990); State v. Hubbard, 103 Wn.2d 570, 575-76, 693 P.2d 718 (1985); cf. State v. Greve, 67 Wn. App. 166, 173-74, 834 P.2d 656 (1992), review denied, 121 Wn.2d 1005 (1993).

In both Holland and Davis, custodial statements gathered in violation of Miranda were admitted at trial because the statements were limited to impeach the defendant's own testimony on the witness stand.

Importantly, the impeachment testimony was offered only after the defendants took the stand in their own defense.

Youngblood's case is distinct from both Holland and Davis. Grant testified in the State's case-in-chief. Because Youngblood had not yet testified, Grant's testimony cannot be considered impeachment. Because the statements were not offered as impeachment, they are inadmissible as a violation of Youngblood's Fifth Amendment right against self incrimination. Easter, 130 Wn.2d at 237; State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997).

(3) The Impeachment Testimony was Harmful.

In response, the State may argue the error is harmless because Grant could have testified after Youngblood. The prejudice of Grant's testimony was not only that it was used for impeachment purposes during the State's case-in-chief, but that it forced Youngblood to testify in his defense.

After the recording of the phone call from jail was played, the jury had heard Youngblood's account of the events of March 2. This account was corroborated by Bybee. Youngblood was not required to testify to prove his defense as much of it was already presented. But because Grant testified, Youngblood was almost forced to testify to rehabilitate his account. Additionally, there is no telling how direct examination of

Youngblood would have gone had Grant not been allowed to testify. Grant's improper impeachment testimony altered the tenor of the defense case.

d. The Error Is Prejudicial.

The State bears the burden of showing a constitutional error was harmless. State v. Easter, 130 Wn.2d at 242; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986). Courts find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). Where the error was not harmless, a new trial is required. Easter, 130 Wn.2d at 242 (citing State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979)).

A person is guilty of assault in the second degree if he, under circumstances not amounting to assault in the first degree … assaults another with a deadly weapon. RCW 9A.36.021(3). Because the term "assault" is not statutorily defined, Washington courts apply the common law definition to the crime. State v. Aumick, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995). At common law, Washington recognizes three definitions of assault:

> (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is inapplicable of inflicting that harm.

Id. (quoting State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992)). Only the third definition is at issue here. A jury may infer specific intent to create fear from the defendant's pointing a gun at a victim. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

Given the untainted evidence absent Grant's testimony, the state cannot show the jury would have disbelieved Youngblood's account of the event as self-defense, and the jury may have voted to exonerate him of the second degree assault charge as well.

Evidence of prior convictions creates the same harms as ER 609 and 404(b) evidence. As shown in argument C.1.c. supra, the Supreme Court has recognized the inherent prejudice of prior conviction evidence and its tendency to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. Calegar, 133 Wn.2d at 724. Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that defendant is a "bad" person and therefore guilty of the crime charged. Newton, 109 Wn.2d at 76. References to mental disabilities may also affect the jury's determination of credibility.

The jury heard two accounts of what transpired on March 2, 2004. The determination of guilt was based exclusively on the credibility determinations of Gillen and Youngblood. Youngblood's credibility is notably essential because he is arguing self-defense. Grant's reference to Youngblood's prior conviction created prejudice because it raised questions about Youngblood's veracity. Grant's statement comparing Youngblood's mental state to someone who is "wild, uncontrolled sort of personality type" and who "doesn't have a conscience," 1RP 418, painted Youngblood as a dishonest and unreliable witness. Evidence suggesting Youngblood was dishonest, mentally incompetent, or a recidivist would unfairly encourage the to give Gillen more credence than warranted.

The fact that the jury acquitted Youngblood of extortion and the greater assault charge shows it had reservations about the State's case-in-chief. Even with the prejudicial and harmful evidence against Youngblood, the jury found him guilty only of the lesser included charge. Subtracting the statements about Youngblood's robbery conviction, the State's case is substantially weaker.

Because admission of Youngblood's prior conviction and Grant's improper impeachment testimony was prejudicial, Youngblood's conviction should be reversed and the case remanded for a new trial.

5. THE PROSECUTOR'S CLOSING ARGUMENT WAS PREJUDICIAL MISCONDUCT.

The state and federal constitutions guarantee an accused the right to a fair trial. U.S. Const. amend. 6, 14; Const. art. 1, §§ 3, 22. "Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Where there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict, the accused is deprived of a fair trial. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Reed, 102 Wn.2d 140, 145, 684 P. 2d 699 (1984).

The State bears the burden of proving each element of its case beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. at 364. The prosecutor cannot make arguments that shift the state's burden to the defense. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990), cert. denied, 499 U.S. 948 (1991). Where a prosecutor's argument is flagrant and ill-intentioned and could not be remedied by a curative instruction, no objection is required to preserve the error for appeal. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 887 (1994), cert. denied, 514 U.S. 1129 (1995). In its rebuttal, the state violated these settled rules.

During closing argument the prosecutor repeatedly misstated the law of self-defense as it related to Youngblood's duty to retreat. During closing, the prosecutor claimed Youngblood's use of force was not "necessary" because he had reasonably effective alternatives. Despite the "no duty to retreat" instruction, the prosecutor on several occasions asserted Youngblood should have: (1) "gotten out of Gillen's house," 2RP 167; (2) "backed off," 2RP 168; and (3) "walk[ed] out of the house," 2RP 168. The prosecutor returned to this idea in rebuttal, again asserting Youngblood should have left as a reasonable alternative to using force. 2RP 195.

The present case is analogous to State v. Davenport. Davenport was charged with second degree burglary. At the end of trial, the prosecutor offered instructions on burglary, but not accomplice liability. 100 Wn.2d at 759. In closing, the prosecutor argued Davenport was unlawfully in the residence. Davenport argued the State did not prove its case because it failed to show that Davenport was in the residence. No witness testified he was inside the residence. On rebuttal, the prosecutor stated, "it doesn't make any difference actually who went into the house … they are accomplices." Id. The Supreme Court agreed with Davenport that prosecutorial misconduct occurred because the state did not propose, nor did the trial court give, an accomplice instruction. Id., at 760. The

Court announced that "statements by the prosecutor or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court." Id., at 760. The Davenport Court also found that the prosecutor's comments were "of a very serious nature" and were prejudicial because they advanced an alternate legal theory. Davenport, at 763-64.

The prejudice is further revealed by State v. Williams, 81 Wn. App. 738, 744, 915 P.2d 738 (1996). The Williams court recognized the failure to give a no-duty-to-retreat instruction raised the possibility that the jury rejected the self-defense claim on improper grounds.

> In the absence of the "no duty to retreat" instruction, a reasonable juror could have … erroneously concluded that the [defendant] used more force than was necessary because [he] did not use the obvious and reasonably effective alternative of retreat. Thus, we clarify the rule, and hold that where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given.

Williams, 81 Wn. App. at 744. Because there was a possibility that the jury erroneously concluded that Williams's failure to retreat resulted in excessive force, Division I refused to find the error harmless. Williams, 81 Wn. App. at 744; accord State v. Wooten, 87 Wn. App. 821, 826, 945 P.2d 1144 (1997).

Youngblood's case resides at the analytical confluence of Davenport and Williams. Although the jury was properly instructed there is no duty to retreat when a person is assaulted in a place where he or she has a right to be, the prosecutor's argument repeatedly misstated that instruction. Like Davenport, Youngblood was prejudiced because the prosecutor's comments provided an alternate theory to convict. As in Williams, the erroneous impression that the defendant had a "duty to retreat" allowed a reasonable juror to find Youngblood otherwise acted reasonably, but nonetheless used excessive force because he did not use the alternative of retreat.

Based on the improper argument, the jury could have convicted Youngblood based on a misunderstanding of the law of self-defense. Because the prosecutor's misconduct was prejudicial, the assault conviction should be reversed and the case remanded for a new trial.

6. CUMULATIVE ERROR REQUIRES REVERSAL.

In response, the State may contend that each of the errors above need not individually result in reversal. But Washington law is well-settled in recognizing "[t]he combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial." State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); see also State v. Coe,

101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). Reversal is required whenever cumulative errors "deny a defendant a fair trial." State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn. 2d 1019 (1997).

The above errors, taken together, denied Youngblood a fair trial. The trial errors can be categorized in two ways: (1) repeated misstatements about the law of self-defense that deprived Youngblood of his ability to argue his theory of the case, and (2) unfairly prejudicial testimony that undercut Youngblood's defense.

The repeated and erroneous admission of unfairly prejudicial evidence portrayed Youngblood as a violent felon with multiple mental disorders. The jurors repeatedly heard Youngblood was a felon in voir dire (1RP 56-75); Grant said he committed armed robbery (1RP 419-20); they heard Youngblood had PTSD, antisocial personality disorder, and borderline personality disorder (1RP 415); and Grant characterized someone with Youngblood's conditions as "a wild, uncontrolled sort of personality type" and one in which "the guy … doesn't have a conscience." 1RP 418.

These statements could have only negatively impacted the jury's self-defense deliberations. As mentioned above, the unfairly prejudicial statements allowed conviction based on improper reasons. Even with

these errors, this jury had obvious difficulty with Gillen and the state's theory, expressly rejecting the extortion charge and first degree assault, and convicting only of second degree assault.

Added to the above errors were the errors relating to the self-defense instructions. The erroneous instruction limited the availability of self-defense as did the prosecutor's misstatement of the "no duty to retreat" law in closing argument. Both errors improperly restricted Youngblood's ability to argue self-defense. Because these errors cumulatively deprived Youngblood of a fair opportunity to present his theory of the case, this court should reverse Youngblood's conviction.

D. CONCLUSION

For the reasons stated above, this Court should reverse Youngblood's conviction and remand for a new trial.

Respectfully submitted this 30th day of April, 2007,

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